

BEFORE THE  
MEDICAL BOARD OF CALIFORNIA  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

|                                 |   |                         |
|---------------------------------|---|-------------------------|
| In the Matter of the Accusation | ) |                         |
| Against:                        | ) |                         |
|                                 | ) |                         |
|                                 | ) |                         |
| HERBERT MARSHAK, M.D.           | ) | File No. 11-2009-200559 |
|                                 | ) |                         |
| Physician's and Surgeon's       | ) |                         |
| Certificate No. A-29118         | ) |                         |
|                                 | ) |                         |
| Respondent                      | ) |                         |
| _____                           | ) |                         |

DECISION

The attached Stipulated Settlement and Disciplinary Order is hereby adopted as the Decision and Order of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on September 23, 2011.

IT IS SO ORDERED August 24, 2011.

MEDICAL BOARD OF CALIFORNIA

By:   
Hedy Chang, Chair  
Panel B

1 KAMALA D. HARRIS  
Attorney General of California  
2 GLORIA L. CASTRO  
Supervising Deputy Attorney General  
3 EDWARD K. KIM  
Deputy Attorney General  
4 State Bar No. 195729  
300 So. Spring Street, Suite 1702  
5 Los Angeles, CA 90013  
Telephone: (213) 897-7336  
6 Facsimile: (213) 897-9395  
*Attorneys for Complainant*  
7

8 **BEFORE THE**  
**MEDICAL BOARD OF CALIFORNIA**  
9 **DEPARTMENT OF CONSUMER AFFAIRS**  
10 **STATE OF CALIFORNIA**

11 In the Matter of the Accusation Against:

Case No. 11-2009-200559

12 **HERBERT MARSHAK, M.D.,**  
13 **3484 E. 1st Street**  
**Los Angeles, CA 90063**

OAH No. 2010120861

14 **Physician's and Surgeon's Certificate**  
15 **No. A29118**

**STIPULATED SETTLEMENT AND**  
**DISCIPLINARY ORDER**

16 Respondent.

17 In the interest of a prompt and speedy settlement of this matter, consistent with the public  
18 interest and the responsibility of the Medical Board of California of the Department of Consumer  
19 Affairs, the parties hereby agree to the following Stipulated Settlement and Disciplinary Order  
20 which will be submitted to the Board for approval and adoption as the final disposition of the  
21 Accusation.

22 PARTIES

23 1. Linda K. Whitney (Complainant) is the Executive Director of the Medical Board of  
24 California. She brought this action solely in her official capacity and is represented in this matter  
25 by Kamala D. Harris, Attorney General of the State of California, by Edward K. Kim, Deputy  
26 Attorney General.

27 2. Respondent Herbert Marshak, M.D. (Respondent) is represented in this proceeding by  
28 attorney Henry Lewin, Esq., whose address is: 11377 Olympic Blvd., 5th Floor, Los Angeles, CA

1 90064-1683.

2 3. On or about March 21, 1975, the Board issued Physician's and Surgeon's Certificate  
3 Number A29118 to Herbert Marshak, M.D. (Respondent). That license was in full force and  
4 effect at all times relevant to the charges brought herein and will expire on August 31, 2011,  
5 unless renewed.

6 JURISDICTION

7 4. Accusation No. 11-2009-200559 was filed before the Medical Board of California  
8 (Board), Department of Consumer Affairs, and is currently pending against Respondent. The  
9 Accusation and all other statutorily required documents were properly served on Respondent on  
10 November 30, 2010. Respondent timely filed his Notice of Defense contesting the Accusation.  
11 A copy of Accusation No. 11-2009-200559 is attached as exhibit A and incorporated herein by  
12 reference.

13 ADVISEMENT AND WAIVERS

14 5. Respondent has carefully read, fully discussed with counsel, and understands the  
15 charges and allegations in Accusation No. 11-2009-200559. Respondent has also carefully read,  
16 fully discussed with counsel, and understands the effects of this Stipulated Settlement and  
17 Disciplinary Order.

18 6. Respondent is fully aware of his legal rights in this matter, including the right to a  
19 hearing on the charges and allegations in the Accusation; the right to be represented by counsel at  
20 his own expense; the right to confront and cross-examine the witnesses against him; the right to  
21 present evidence and to testify on his own behalf; the right to the issuance of subpoenas to compel  
22 the attendance of witnesses and the production of documents; the right to reconsideration and  
23 court review of an adverse decision; and all other rights accorded by the California  
24 Administrative Procedure Act and other applicable laws.

25 7. Respondent voluntarily, knowingly, and intelligently waives and gives up each and  
26 every right set forth above.

27 CULPABILITY

28 8. Respondent admits that in 2008, in connection with one patient, Respondent failed to

1 maintain adequate records and failed to communicate with other health care practitioners  
2 regarding her care and treatment, in violation of Business and Professions Code sections 2266 and  
3 2234, subdivision (c), respectively.

4 9. Respondent agrees that his Physician's and Surgeon's Certificate is subject to  
5 discipline and he agrees to be bound by the Board's imposition of discipline as set forth in the  
6 Disciplinary Order below

7 CIRCUMSTANCES IN MITIGATION

8 9. Respondent Herbert Marshak, M.D. has never been the subject of any disciplinary  
9 action. He is admitting responsibility at an early stage in the proceedings.

10 RESERVATION

11 10. The admissions made by Respondent herein are only for the purposes of this  
12 proceeding, or any other proceedings in which the Medical Board of California or other  
13 professional licensing agency is involved, and shall not be admissible in any other criminal or  
14 civil proceeding.

15 CONTINGENCY

16 11. This stipulation shall be subject to approval by the Medical Board of California.  
17 Respondent understands and agrees that counsel for Complainant and the staff of the Medical  
18 Board of California may communicate directly with the Board regarding this stipulation and  
19 settlement, without notice to or participation by Respondent or his counsel. By signing the  
20 stipulation, Respondent understands and agrees that he may not withdraw his agreement or seek  
21 to rescind the stipulation prior to the time the Board considers and acts upon it. If the Board fails  
22 to adopt this stipulation as its Decision and Order, the Stipulated Settlement and Disciplinary  
23 Order shall be of no force or effect, except for this paragraph, it shall be inadmissible in any legal  
24 action between the parties, and the Board shall not be disqualified from further action by having  
25 considered this matter.

26 12. The parties understand and agree that facsimile copies of this Stipulated Settlement  
27 and Disciplinary Order, including facsimile signatures thereto, shall have the same force and  
28 effect as the originals.

1 13. In consideration of the foregoing admissions and stipulations, the parties agree that  
2 the Board may, without further notice or formal proceeding, issue and enter the following  
3 Disciplinary Order:

4 **DISCIPLINARY ORDER**

5 **A. PUBLIC REPRIMAND**

6 IT IS HEREBY ORDERED that Physician's and Surgeon's Certificate Number A29118  
7 issued to Herbert Marshak, M.D. is Publicly Reprimanded pursuant to California Business and  
8 Professions Code section 2227, subdivision (a)(4). This Public Reprimand, which is issued in  
9 connection with Accusation No. 11-2009-200559, is as follows:

10 On November 30, 2010, the Medical Board of California filed an accusation against your  
11 license to practice medicine. The accusation was based on your care and treatment of a single  
12 patient in 2008, during which you failed to communicate with other health care practitioners  
13 regarding her care and treatment, and failed to maintain adequate medical records, in violation of  
14 Business and Professions Code sections 2234, subdivision (c), and 2266. Practicing within the  
15 standard of care is necessary for protection of the public, and maintaining appropriate records of  
16 patient care is absolutely necessary not only to ensure proper treatment by you, but also by  
17 subsequent treating physicians.

18 **B. PRESCRIBING PRACTICES COURSE**

19 Within 60 calendar days of the effective date of this Decision, respondent shall enroll in a  
20 course in prescribing practices, at respondent's expense, approved in advance by the Board or its  
21 designee. Failure to successfully complete the course within the first 6 months of the effective  
22 date of this Decision shall be deemed unprofessional conduct and grounds for further disciplinary  
23 action.

24 A prescribing practices course taken after the acts that gave rise to the charges in the  
25 Accusation, but prior to the effective date of the Decision may, in the sole discretion of the Board  
26 or its designee, be accepted towards the fulfillment of this condition if the course would have  
27 been approved by the Board or its designee had the course been taken after the effective date of  
28 this Decision. Respondent shall submit a certification of successful completion to the Board or its

1 designee not later than 15 calendar days after successfully completing the course, or not later than  
2 15 calendar days after the effective date of the Decision, whichever is later.

3 C. MEDICAL RECORD KEEPING COURSE

4 Within 60 calendar days of the effective date of this decision, Respondent shall enroll in a  
5 course in medical record keeping, at Respondent's expense, approved in advance by the Board or  
6 its designee. Failure to successfully complete the course within the first 6 months of the effective  
7 date of this Decision shall be deemed unprofessional conduct and grounds for further disciplinary  
8 action.

9 A medical record keeping course taken after the acts that gave rise to the charges in the  
10 Accusation, but prior to the effective date of the Decision may, in the sole discretion of the Board  
11 or its designee, be accepted towards the fulfillment of this condition if the course would have  
12 been approved by the Board or its designee had the course been taken after the effective date of  
13 this Decision.

14 Respondent shall submit a certification of successful completion to the Board or its  
15 designee not later than 15 calendar days after successfully completing the course, or not later than  
16 15 calendar days after the effective date of the Decision, whichever is later.

17  
18  
19 I have carefully read the above Stipulated Settlement and Disciplinary Order and have fully  
20 discussed it with my attorney, Henry Lewin. I understand the stipulation and the effect it will  
21 have on my Physician's and Surgeon's Certificate. I enter into this Stipulated Settlement and  
22 Disciplinary Order voluntarily, knowingly, and intelligently, and agree to be bound by the  
23 Decision and Order of the Medical Board of California.

24  
25 DATED: \_\_\_\_\_

26 HERBERT MARSHAK, M.D.  
27 Respondent  
28

1 designee not later than 15 calendar days after successfully completing the course, or not later than  
2 15 calendar days after the effective date of the Decision, whichever is later.

3 C. MEDICAL RECORD KEEPING COURSE

4 Within 60 calendar days of the effective date of this decision, Respondent shall enroll in a  
5 course in medical record keeping, at Respondent's expense, approved in advance by the Board or  
6 its designee. Failure to successfully complete the course within the first 6 months of the effective  
7 date of this Decision shall be deemed unprofessional conduct and grounds for further disciplinary  
8 action.

9 A medical record keeping course taken after the acts that gave rise to the charges in the  
10 Accusation, but prior to the effective date of the Decision may, in the sole discretion of the Board  
11 or its designee, be accepted towards the fulfillment of this condition if the course would have  
12 been approved by the Board or its designee had the course been taken after the effective date of  
13 this Decision.

14 Respondent shall submit a certification of successful completion to the Board or its  
15 designee not later than 15 calendar days after successfully completing the course, or not later than  
16 15 calendar days after the effective date of the Decision, whichever is later.

17  
18  
19 I have carefully read the above Stipulated Settlement and Disciplinary Order and have fully  
20 discussed it with my attorney, Henry Lewin. I understand the stipulation and the effect it will  
21 have on my Physician's and Surgeon's Certificate. I enter into this Stipulated Settlement and  
22 Disciplinary Order voluntarily, knowingly, and intelligently, and agree to be bound by the  
23 Decision and Order of the Medical Board of California.

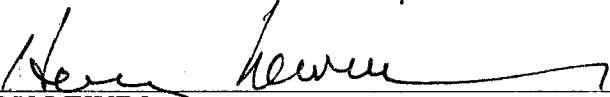
24  
25 DATED: 7-27-11

Herbert Marshak

26 HERBERT MARSHAK, M.D.  
27 Respondent  
28

1 I have read and fully discussed with Respondent Herbert Marshak, M.D. the terms and  
2 conditions and other matters contained in the above Stipulated Settlement and Disciplinary Order.

3 I approve its form and content.

4 DATED: July 27, 2011   
5 HENRY LEWIN  
6 Attorney for Respondent

7 ENDORSEMENT

8 The foregoing Stipulated Settlement and Disciplinary Order is hereby respectfully  
9 submitted for consideration by the Medical Board of California of the Department of Consumer  
10 Affairs.

11 Dated: July 22, 2011

12 Respectfully submitted,  
13 KAMALA D. HARRIS  
14 Attorney General of California  
15 GLORIA L. CASTRO  
16 Supervising Deputy Attorney General

17 EDWARD K. KIM  
18 Deputy Attorney General  
19 *Attorneys for Complainant*

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1 I have read and fully discussed with Respondent Herbert Marshak, M.D. the terms and  
2 conditions and other matters contained in the above Stipulated Settlement and Disciplinary Order.  
3 I approve its form and content.

4 DATED: \_\_\_\_\_

HENRY LEWIN  
Attorney for Respondent

6  
7 ENDORSEMENT

8 The foregoing Stipulated Settlement and Disciplinary Order is hereby respectfully  
9 submitted for consideration by the Medical Board of California of the Department of Consumer  
10 Affairs.

11 Dated: July 22, 2011

Respectfully submitted,

12  
13 KAMALA D. HARRIS  
Attorney General of California  
14 GLORIA L. CASTRO  
Supervising Deputy Attorney General

15 

16 EDWARD K. KIM  
17 Deputy Attorney General  
*Attorneys for Complainant*

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**Exhibit A**

**Accusation No. 11-2009-200559**

1 EDMUND G. BROWN JR.  
Attorney General of California  
2 ROBERT MCKIM BELL  
Supervising Deputy Attorney General  
3 EDWARD K. KIM  
Deputy Attorney General  
4 State Bar No. 195729  
300 So. Spring Street, Suite 1702  
5 Los Angeles, CA 90013  
Telephone: (213) 897-7336  
6 Facsimile: (213) 897-9395  
*Attorneys for Complainant*

FILED  
STATE OF CALIFORNIA  
MEDICAL BOARD OF CALIFORNIA  
SACRAMENTO *November 30 2011*  
BY *[Signature]* ANALYST

8 **BEFORE THE**  
9 **MEDICAL BOARD OF CALIFORNIA**  
10 **DEPARTMENT OF CONSUMER AFFAIRS**  
11 **STATE OF CALIFORNIA**

11 In the Matter of the Accusation Against:

Case No. 11-2009-200559

12 HERBERT MARSHAK, M.D.,  
3484 E. 1st Street  
13 Los Angeles, CA 90063

OAH No.

**ACCUSATION**

14 Physician's and Surgeon's Certificate  
15 No. A29118

Respondent.

17 Complainant alleges:

18 **PARTIES**

19 1. Linda K. Whitney (Complainant) brings this Accusation solely in her official capacity  
20 as the Executive Director of the Medical Board of California, Department of Consumer Affairs  
21 (Board).<sup>1</sup>

22 2. On or about March 21, 1975, the Board issued Physician's and Surgeon's Certificate  
23 Number A29118 to Herbert Marshak, M.D. (Respondent). That license was in full force and  
24 effect at all times relevant to the charges brought herein and will expire on August 31, 2011,  
25 unless renewed.

26  
27 <sup>1</sup> Pursuant to Business and Professions Code section 2002, "Division of Medical Quality"  
28 or "Division" shall be deemed to refer to the Medical Board of California.

JURISDICTION

3. This Accusation is brought before the Board, under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 2227 of the Code provides that a licensee who is found guilty under the Medical Practice Act may have his or her license revoked, suspended for a period not to exceed one year, placed on probation and required to pay the costs of probation monitoring, or such other action taken in relation to discipline as the Board deems proper.

5. Section 2234 of the Code states:

“The Division of Medical Quality shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

“(a) Violating or attempting to violate, directly or indirectly, assisting in or abetting the violation of, or conspiring to violate any provision of this chapter [Chapter 5, the Medical Practice Act].

“(b) Gross negligence.

“(c) Repeated negligent acts. To be repeated, there must be two or more negligent acts or omissions. An initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care shall constitute repeated negligent acts.

“(1) An initial negligent diagnosis followed by an act or omission medically appropriate for that negligent diagnosis of the patient shall constitute a single negligent act.

“(2) When the standard of care requires a change in the diagnosis, act, or omission that constitutes the negligent act described in paragraph (1), including, but not limited to, a reevaluation of the diagnosis or a change in treatment, and the licensee's conduct departs from the applicable standard of care, each departure constitutes a separate and distinct breach of the standard of care.

“(d) Incompetence.

“(e) The commission of any act involving dishonesty or corruption which is substantially related to the qualifications, functions, or duties of a physician and surgeon.

1 “(f) Any action or conduct which would have warranted the denial of a certificate.”

2 6. Section 2266 of the Code states: “The failure of a physician and surgeon to maintain  
3 adequate and accurate records relating to the provision of services to their patients constitutes  
4 unprofessional conduct.”

5 FACTUAL ALLEGATIONS

6 7. A. In or around 1999, patient M.H.,<sup>2</sup> a woman, sustained a workplace injury as a  
7 veterinary technician in an animal hospital. She attempted to keep a large dog of approximately  
8 110 lbs on a surgical table, and injured her back. Since then, M.H. has suffered from chronic pain  
9 and has continually sought medical treatment for her pain and other conditions.

10 B. In or around 2008, M.H. was referred to Respondent. While under Respondent’s  
11 care, patient M.H. was prescribed a combination of Klonopin<sup>3</sup>, Ambien<sup>4</sup>, Somnote (chloral  
12 hydrate)<sup>5</sup>, and Prozac<sup>6</sup>. For example, Respondent prescribed drugs to M.H. as follows:

13 -Ambien, 12.5 mg; Klonopin, 1 mg; Lithium 300 mg; and Somnote 500 mg; on or  
14 about February 13, 2008.

15 -Somnote 500 mg; on or about February 27, 2008.

16 -Ambien, 12.5 mg; Klonopin, 1 mg; Somnote 500 mg; and Prozac, 40 mg; on or  
17 about March 14, 2008.

18 -Ambien, 12.5 mg; Klonopin, 1 mg; and Somnote 500 mg; on or about April 11,  
19 2008.

20 -Ambien, 12.5 mg; Klonopin, 1 mg; Somnote 500 mg; on or about May 6, 2008.

21 -Klonopin, 1 mg; Xanax 0.5 mg; on or about June 30, 2008.  
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24 <sup>2</sup> This patient is referred to herein by her initials to protect her privacy. The full name of  
the patient will be disclosed to Respondent upon a timely request for discovery.

25 <sup>3</sup> A benzodiazepine derivative with anticonvulsant, muscle relaxant properties.

26 <sup>4</sup> A sedative-hypnotics used for the short-term treatment of insomnia.

27 <sup>5</sup> A hypnotic and a sedative medication that slows the activity of your central nervous  
system.

28 <sup>6</sup> An antidepressant used to treat depression, obsessive-compulsive disorder, some eating  
disorders, and panic attacks.

1 -Ambien, 12.5 mg; Klonopin, 1 mg; chloral hydrate 500 mg; and Prozac 40 mg; on  
2 or about September 17, 2008.

3 -Ambien, 12.5 mg; Klonopin, 1 mg; Somnote 500 mg; and Xanax, 0.5 mg; on or  
4 about July 3, 2008.

5 -Ambien, 12.5 mg; Klonopin, 1 mg; Somnote 500 mg; and Xanax, 0.5 mg; on or  
6 about September 24, 2008.

7 -Ambien, 12.5 mg; Klonopin, 1 mg; Somnote 500 mg; and Xanax, 0.5 mg; on or  
8 about October 15, 2008.

9 -Xanax 0.5 mg, on or about October 24, 2008.

10 -Ambien, 12.5 mg; Klonopin, 1 mg; and Somnote 500 mg; on or about  
11 November 13, 2008.

12 -Xanax, 0.5 mg; on or about November 14, 2008.

13 -Ambien, 12.5 mg; Klonopin, 1 mg; and Somnote 500 mg; and Xanax, 0.5 mg; on  
14 or about December 9, 2008.

15 C. During this period of time, M.H. also obtained supplemental drugs from other  
16 medical professionals, including, opiates and Soma. In 2008, another physician became  
17 concerned about M.H.'s drug prescriptions, and attempted to contact Respondent to coordinate  
18 care for M.H. However, Respondent failed to adequately follow up with that concerned  
19 physician. In addition, Respondent's workers compensation case manager, also attempted to  
20 coordinate care with Respondent, but also was unsuccessful.

21 D. On or about February 9, 2009 M.H. was admitted to UCI Medical Center through the  
22 Emergency Room for one day after having struck her head and was diagnosed with syncope.  
23 Shortly thereafter on or about February 15, 2009, M.H. was admitted for one day to Huntington  
24 Beach Hospital. She had experienced a seizure that was related to her medications.

#### 25 FIRST CAUSE FOR DISCIPLINE

26 (Gross Negligence)

27 8. Respondent is subject to disciplinary action under section 2234, subdivision (b), of  
28 the Code in that Respondent was grossly negligent in the care and treatment of a patient. The

1 circumstances are as follows:

2 A. The facts and circumstances alleged in paragraphs 7A. through 7D., inclusive above  
3 are incorporated herein as if fully set forth.

4 B. On or about February 13, 2008 and thereafter, Respondent was grossly negligent in  
5 his care and treatment of patient M.H. by failing to communicate, and coordinate care, with other  
6 health care practitioners, including the patient's primary care physician in a collaborative manner.

7 SECOND CAUSE FOR DISCIPLINE

8 (Repeated Negligent Acts)

9 9. Respondent is subject to disciplinary action under section 2234, subdivision (c), of  
10 the Code in that respondent engaged in repeated negligent acts in the care and treatment of a  
11 patient. The circumstances are as follows:

12 A. The allegations of the First Cause for Discipline is incorporated herein by reference  
13 as if fully set forth.

14 B. In addition, on or about February 13, 2008 and thereafter, Respondent was negligent  
15 in his care and treatment of patient M.H. by improperly managing the patient's prescriptions and  
16 engaging in poor psychopharmacology.

17 THIRD CAUSE FOR DISCIPLINE

18 (Incompetence)

19 10. Respondent is subject to disciplinary action under section 2234, subdivision (d), of  
20 the Code in that respondent engaged in repeated negligent acts in the care and treatment of a  
21 patient. The circumstances are as follows:

22 A. The allegations of the First and Second Causes for Discipline are incorporated herein  
23 by reference as if fully set forth.

24 B. In addition, Respondent's care and treatment of patient M.H. constituted  
25 incompetence because he failed to grasp modern psychopharmacology, including the use and  
26 effects of Klonopin and Chloral Hydrate.

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FOURTH CAUSE FOR DISCIPLINE

(Failure to Keep Adequate and Accurate Records)

11. Respondent is subject to disciplinary action under section 2266 of the Code, in that Respondent failed to keep adequate and accurate records related to the provision of medical services to a patient. The circumstances are as follows:

A. The allegations of the First, Second and Third Causes for Discipline are incorporated herein by reference as if fully set forth.

FIFTH CAUSE FOR DISCIPLINE

(General Unprofessional Conduct)

12. Respondent is subject to disciplinary action under section 2234 of the Code, in that he committed general unprofessional conduct. The circumstances are as follows:

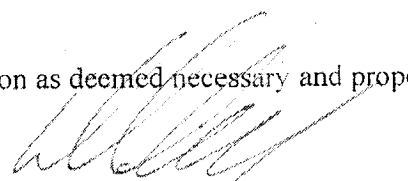
A. The allegations of the First, Second, Third and Fourth Causes for Discipline are incorporated herein by reference as if fully set forth.

PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Medical Board of California issue a decision:

- 1. Revoking or suspending Physician's and Surgeon's Certificate Number A29118, issued to Herbert Marshak, M.D.;
- 2. Revoking, suspending or denying approval of his authority to supervise physician assistants, pursuant to section 3527 of the Code;
- 3. Ordering him to pay the Medical Board of California the costs of probation monitoring, if placed on probation; and
- 4. Taking such other and further action as deemed necessary and proper.

DATED: November 30, 2010 .

  
 \_\_\_\_\_  
 LINDA K. WHITNEY  
 Executive Director  
 Medical Board of California  
 Department of Consumer Affairs  
 State of California  
 Complainant